Supreme Court, U.S.
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No. 98-1614

In The

Supreme Court of the United States

October Term, 1998

BOB E. CROMER,

Petitioner,

v.

BAYLOR UNIVERSITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties except as follows. Counsel for Respondent are:

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Baylor University, a Texas non-profit corporation, does not have any parent corporations. There are no nonwholly-owned subsidiaries of Baylor University.

Although Petitioner lists John D. McClanahan in the caption of the case as a Respondent, Petitioner does not list him as an interested party, and the question presented by Petitioner does not involve the claim made against McClanahan in the courts below. Thus, Baylor assumes that McClanahan is not a Respondent. To the extent that McClanahan is considered a Respondent, he is also represented by the same counsel as Baylor.

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BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Bob E. Cromer, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on December 7, 1998.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner filed suit against Baylor on July 18, 1997, alleging that Baylor's decision to deny him tenure was motivated by gender discrimination. On November 20, 1997, Baylor filed a Motion for Summary Judgment asserting that Petitioner's discrimination claims were barred by the statute of limitations. After receiving an extension of time to respond to the Motion for Summary Judgment, Petitioner filed his response on December 3, 1997. On January 13, 1998, the District Court, in an unpublished order, granted Baylor's Motion for Summary Judgment due to Petitioner's failure to timely file his charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").

On February 12, 1998, Petitioner filed his Notice of Appeal. The Fifth Circuit heard oral argument of the case on December 3, 1998. Four days later, in a two sentence, unpublished, per curiam opinion, the Fifth Circuit unanimously affirmed the judgment of the District Court on December 7, 1998.

Statement of Facts

In 1989 Baylor hired Petitioner as an Assistant Professor in the Department of Art at Baylor University. Petitioner continued to teach at Baylor for several years under a series of annual contracts. In 1994 Petitioner submitted an application for tenure. On January 11, 1995, the Tenure Committee recommended to the Administration that Petitioner not be granted tenure. Although the Tenure Committee makes a recommendation as to the grant or denial of tenure, the ultimate decision as to whether to grant or deny tenure is made by the President and Provost of Baylor, in consultation with the appropriate dean. By letter dated February 20, 1995, from then President of Baylor Herbert H. Reynolds, Baylor unequivocally notified Petitioner that his request for tenure was denied and that the 1995-96 academic year would be his terminal year as a member of the Baylor faculty. Specifically, the letter informed Petitioner: "I am advising you that you are being denied tenure at Baylor University and that the 1995-96 academic year will be your terminal year as a member of the University faculty."

Although there is no procedure to appeal or request reconsideration of tenure decisions at Baylor, by letter dated March 8, 1995, Petitioner requested reevaluation of the tenure denial. Baylor nevertheless issued a written terminal contract to Petitioner several weeks later on March 31, 1995. Like the earlier letter to Petitioner from Dr. Reynolds, which notified Petitioner that he had been denied tenure, the contract unequivocally reiterated that Petitioner had been denied tenure and that the contract was "a one year terminal contract." Petitioner signed the

contract – a contract which defined the legal relationship between the parties.

As the contract made clear, the tenure decision was final and had been implemented. By letter dated May 4, 1995, the Chair of the Tenure Committee informed Petitioner that the Committee would reevaluate its tenure recommendation, but also informed Petitioner that: "This reevaluation does not necessarily mean that the recommendation of the Tenure Committee or the decision of the University will change." Indeed, neither the written tenure denial issued by the President of the University nor the terminal contract were ever withdrawn. On June 8, 1995, the Tenure Committee wrote to Dr. Schmeltekopf, the Vice-President and Provost, and stated that it was withdrawing its previous negative tenure recommendation and was declining to make either a positive or negative recommendation as to tenure. After Dr. Schmeltekopf informed the Committee that it must make a positive or negative recommendation, the Committee, by letter dated September 27, 1995, recommended that Petitioner be granted tenure. The recommendation was forwarded to the new President of Baylor, Robert B. Sloan; however, Dr. Sloan reiterated the decision of Baylor to deny tenure to Petitioner, and the decision was communicated to Petitioner by letter dated November 16, 1995.

On September 11, 1996, over one and a half years after President Reynolds notified Petitioner of the tenure denial, Petitioner filed his charge of discrimination with the EEOC. The charge is dated as being signed by Petitioner on September 3, 1996.

Petitioner asserted that the Chair of his department, John McClanahan, treated Petitioner unfairly as compared to a female professor. Petitioner's Original Complaint and his Response to the Motion for Summary Judgment went to great length in complaining about every petty slight which Petitioner imagined while he was employed at Baylor. Petitioner believed that McClanahan's plans against him culminated in McClanahan placing a memo in the tenure review file which led to the Tenure Committee's recommendation to deny tenure in January 1995. Petitioner's chief complaint was the allegation that McClanahan allegedly sabotaged his tenure application by convincing the Tenure Committee to recommend a denial of tenure. Petitioner's sole complaints about discrimination in the tenure denial process were the allegations that McClanahan put a memo in his tenure file, misrepresented facts, and withheld information prior to the February 20, 1995 denial of tenure. Petitioner did not allege any facts that would support an argument that any of the three decision makers who reaffirmed the earlier tenure decision, i.e., President Robert Sloan, Vice-President and Provost Donald Schmeltekopf, and Dean William Cooper, discriminated against Petitioner on the basis of his gender. Petitioner's complaints about McClanahan's conduct toward him concerning the tenure decision were all complaints about conduct prior to the February 1995 tenure denial. Consequently, Petitioner never identified any unlawful practice within the limitations period.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons why this Court should grant a Writ of Certiorari in this case. First, Petitioner claims that the decision of the Fifth Circuit was erroneous. Second, Petitioner requests that the Court clarify the statute of limitations issues discussed in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Baylor submits that the decision of the Fifth Circuit is correct. Further, there is no need for clarification of the statute of limitations issues decided in *Ricks*. No reason exists which would merit Supreme Court review of this case. Following a discussion of why this case does not merit review by this Court, Baylor will demonstrate that the Fifth Circuit's decision is correct. Lastly, Baylor will show that there is an additional defect in Petitioner's claims which would render review of the case pointless.

First Ground – This Case Does Not Merit Supreme Court Review

The Question Presented section of Petitioner's Petition demonstrates that this is a case which this Court should decline to review. Petitioner asks this Court to determine whether Petitioner's case is factually distinguishable from the *Ricks* case. As this Court's Rule 10 states: "A petition for writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." All that Petitioner complains about is the alleged misapplication of a rule of law. Petitioner cannot even allege that the rule of law was misstated because the Court of Appeals did not state the

applicable rule of law; rather, it simply cited the applicable case citation.

This case does not meet the criteria for certiorari. There is no allegation of a conflict among the circuits. The case does not raise any important and recurring federal issue requiring clarification by the highest court in the land. There was no dissent in the Court of Appeals, and there was no request for en banc review. This is a fact-bound case in which the Fifth Circuit applied settled law to the facts of the case. Petitioner wishes to debate the application of settled law to the particular facts and circumstances of this case. If this case meets the criteria for certiorari, then so would every case.

Petitioner also claims that this Court should grant certiorari to clarify *Ricks*. No clarification is needed. *Ricks* makes it clear that the statute of limitations begins to run at the time of the alleged unlawful employment practice and that reconsideration of the alleged unlawful decision does not extend the limitations period. Thus, the Supreme Court has already established a bright line rule for aggrieved employees to follow.

Petitioner also complains that the Fifth Circuit's decision will result in repeated injustices if the opinion is used as precedent. As the Court of Appeals did not write an opinion, it is difficult to see how it could be used as precedent. There is actually no appellate opinion for this Court to review. The District Court did write a short opinion; however, the opinion is not published and it has not been picked up by the electronic services as an unpublished opinion. For the opinion to be used as precedent, a party would have to find a copy of the opinion in

the files of the District Clerk for the Western District of Texas.

Petitioner claims that the decisions of the District Court and the Court of Appeals resulted in a great injustice. There has been no injustice in this case. Congress intentionally enacted a short statute of limitations for employment discrimination cases, and the result of Congress' decision is that the deadline for filing claims will often be missed. With respect to Petitioner's claim of injustice, it should also be noted that Petitioner has obtained another job teaching at the University of Mississippi. Moreover, the underlying premise of his claim, that three male administrators discriminated against him because he is male, is preposterous.

This case is simply one of the thousands of non-meritorious employment lawsuits which are filed by disgruntled employees each year and which are needlessly clogging our court system. The District Court properly granted summary judgment in Baylor's favor. The Fifth Circuit reviewed the District Court's decision and unanimously affirmed the judgment. Petitioner now comes to this Court rehashing the arguments he made to the Court of Appeals. This case is of no importance other than to the parties, and the case does not merit the attention of this Court. In addition to being an unimportant case, the case was, as will be demonstrated below, correctly decided.

Second Ground – This Case Was Correctly Decided

As set forth in the charge of discrimination filed with the EEOC, the adverse employment action about which

Petitioner complained was the denial of tenure. Title VII requires aggrieved persons to file a complaint "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Under certain circumstances, the filing period is extended to a maximum of 300 days. *Id.* The 300 day provision may apply if the complainant has "initially instituted proceedings with a state or local agency." *Id.* Petitioner did not file his charge of discrimination until September 11, 1996, 569 days after the tenure denial decision on February 20, 1995.

The United States Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), mandates the decision reached by the District Court and the Court of Appeals in this case. Ricks served as a college professor at Delaware State College. The College formally denied tenure to Ricks on March 13, 1974. The College then issued Ricks a terminal contract on June 26, 1974. Ricks filed a grievance, which operated as a request for reconsideration. The College denied the request for reconsideration on September 12, 1974. Ricks filed a charge with the EEOC on April 4, 1975. This Court stated, "Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 257. The Court noted, "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* The Court then determined that "the only alleged discrimination occurred – and the filing limitations periods therefore commenced – at the time the tenure decision was made and communicated to Ricks. That is so

even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *Id.* at 258 (emphasis in original). After concluding that the limitations periods commenced to run "when the tenure decision was made and the [employee] was notified," *id.* at 259, the Court proceeded to analyze which of several possible dates would commence the running of limitations. The District Court had adopted the date of the terminal contract as the date of the decision, and the Supreme Court found that this decision was not erroneous; however, the Court's discussion indicates that the earlier March 13 date of the notification could have commenced limitations to run. *Id.* at 262 n.17.

Applying the holding of *Ricks* to the present case, Petitioner was required to file his charge of discrimination no later than 300 days from the February 20, 1995 notification of the formal decision to deny tenure. As Petitioner missed this deadline by more than eight months, the District Court and Court of Appeals correctly held that limitations barred the Title VII claims.

Petitioner argues that limitations commenced to run on November 16, 1995, the date on which Dr. Sloan renotified Petitioner that tenure was still denied. Petitioner essentially argues that limitations was tolled while the reevaluation was pending. Such arguments were rejected by this Court in *Ricks*. In *Ricks*, the dissent and the EEOC as amicus curiae argued that limitations should not begin to run until Ricks was notified that his grievance had been denied. The Court rejected this contention and noted: "The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence

when the employer's decision is made." *Id.* at 261. "Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws." *Id.* at 261 n.15.

Petitioner asserts that the result in this case should be different than the result in *Ricks* because the Tenure Committee changed its recommendation while Professor Ricks had no success with his appeals. Under the reasoning put forth by Petitioner, any perceived positive action for an employee in a review process would delay the start of the running of limitations. Such a test would introduce substantial uncertainty into the date on which limitations began to run. How much positive response would there have to be? Under Petitioner's theory, any time there was an extensive review of an employment decision, then it is the later confirmation of the earlier decision that starts limitations running rather than the actual decision at an earlier time. Of course, there will almost always be a fact issue as to whether the review was extensive enough to delay the start of limitations running.

Petitioner's theory also flies in the face of this Court's reasoning in *Ricks*. This Court indicated that courts should use the date of the employment decision for starting limitations as it would not be susceptible to confusion. Indeed, courts must use the date of the employment decision because Title VII mandates that courts use such date. Petitioner's proposed theory also serves to defeat the very purpose for having limitations periods. "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly

assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57.

In an effort to avoid limitations, Petitioner claims that the Tenure Committee's later recommendation for tenure required a new denial of the request for tenure which in turn started a new limitations period running. Such an argument defies logic because the ultimate decision remained in the hands of the Administration and the Administration never indicated to Petitioner that the decision to deny tenure had been altered. In fact, all indications were to the contrary. For example, Baylor issued a terminal contract to Petitioner *while the request for reevaluation was pending*.

It is also important to recall that the Tenure Committee does not make the decision to grant or deny tenure. The tenure decision is made by Provost Schmeltekopf and President Sloan, in consultation with the dean of the college of the tenure candidate. The decision of the Tenure Committee to change its recommendation in no way alters the facts that Petitioner was told on February 20, 1995 by the President of Baylor that tenure had been denied and that this decision never changed. As the February 20, 1995 tenure denial is the alleged discriminatory act about which Petitioner complains, and Petitioner failed to file the charge within the requisite time period, the District Court and the Court of Appeals correctly held that the Title VII claims were barred by the statute of limitations.

Petitioner devotes the Summary of his Petition to an argument that Baylor's tenure process can be analogized

to a lawsuit, but the analogies urged by Petitioner are wholly inaccurate. For example, the Tenure Committee at Baylor has no final decision making authority; it performs an advisory function in connection with decisions to grant or deny tenure. A civil jury, in contrast, is the final decision making authority on questions of fact. Moreover, there is no procedure to seek reconsideration of a tenure denial. Such a request certainly does not suspend or deprive a tenure denial of finality, as does a timely motion for new trial in a lawsuit. These are examples of the many reasons Petitioner's lawsuit analogy is misleading.

Petitioner cites *Reid v. University of Michigan*, 612 F.Supp. 320 (D.C. Mich. 1985), for the proposition that limitations does not begin to run until the tenure reconsideration process is completed. There is a crucial distinction between *Reid* and the present case. In *Reid*, the plaintiff alleged that the reevaluation process itself was discriminatory. *Id.* at 324 ("If plaintiff can prove that the *de novo* decision was discriminatory in these respects, that decision would be an unlawful employment practice occurring within the actionable period."). In the present case, Petitioner has offered no summary judgment evidence that the reaffirmation decision made by President Sloan, Vice-President Schmeltekopf, and Dean Cooper was infected by any discriminatory motivation. Rather, all of Petitioner's summary judgment evidence concerning the tenure decision goes toward proving discrimination by McClanahan leading up to the February 20, 1995 decision. In his Response to Defendants' Motion for Summary Judgment, Petitioner alleged only the following concerning discrimination in the tenure decision:

> Following the 1994 pre-tenure review, Defendant McClanahan prepared and circulated to the tenured faculty a document that misrepresented facts related to Plaintiff's 1994 pre-tenure review. The document was placed in Plaintiff's tenure file but was not disclosed to Plaintiff, and Plaintiff was deprived of an opportunity to respond to the document during the tenure application process. In addition to affirmatively misrepresenting facts to the University Tenure Committee, Defendant McClanahan also failed to disclose to the Committee relevant information that reflected favorably on Plaintiff's suitability for tenure.

Likewise, the allegations in Petitioner's Affidavit in support of his Response to the Motion for Summary Judgment dealing with alleged discrimination in the tenure process were limited to events which occurred prior to the February 20, 1995 decision. Although Petitioner's case is easily distinguishable from *Reid*, it should be further noted that the reasoning in *Reid* is not consistent with *Ricks*. *Ricks* makes it clear that requests for reconsideration will not toll limitations. If requests for reconsideration could toll limitations, a plaintiff could continually extend limitations by continuing to request reconsideration.

A well reasoned Seventh Circuit opinion also rejects many of the arguments put forward by Petitioner. In *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), Northwestern University denied tenure to plaintiff Janet Lever. Although her department unanimously recommended promotion, the vote of the Tenure Committee was one vote shy of the

two-thirds vote needed to recommend tenure. On May 5, 1980, the Dean of the College of Arts and Sciences wrote to Lever that he would not recommend to the Provost that she be promoted and that he was offering her a terminal contract for the 1980-81 year. Despite reviews and re-reviews, the Dean adhered to his decision, and on February 12, 1981, the Provost wrote to Lever that he would not reverse the decision of the Dean not to recommend tenure. After receiving a delegation of disgruntled professors from Lever's department, the Dean agreed that he would review a manuscript on which Lever was working if it was completed by a certain date and that, after further evaluation, he would reverse or confirm his recommendation to the Provost. Lever submitted the manuscript on time, but the Dean did not alter his recommendation on tenure. Lever argued that the Dean's willingness to review further evidence rescinded the earlier decision and started the running of limitations anew. The District Court rejected this contention and held that limitations barred the claim. The Seventh Circuit affirmed and held that the May 5, 1980 letter was the triggering event.

In the present case, Petitioner also argues that the decision to review the recommendation and permitting the opportunity to submit new evidence delayed the running of limitations. This argument is the same one that was rejected by the Seventh Circuit. Lever also made another argument similar to one made by Petitioner herein that was rejected. Lever argued that she should not have to file a Charge of Discrimination while the review was pending. As the Court explained, "An employer's refusal to undo a discriminatory decision is

not a fresh act of discrimination. If it were, then an employee could avoid the 300-day limit by filing a series of appeals or fresh requests. . . . " *Id.* at 556. Lever claimed that it would create friction during the review and appeals process if she had to file a Charge during that time. In rejecting that argument based on the policy reasons for having statutes of limitations set forth in *Ricks,* the Court noted in passing that Lever could have had her cake and eaten it too because seventeen of the 300 days remained at the time the Provost said no on February 12, 1981. Likewise, in the present case, Petitioner could have also had his cake and eaten it too. When Dr. Sloan wrote to Petitioner on November 16, 1995, approximately one month remained before the 300 days ran from the February 20, 1995 denial of tenure. The same argument concerning the creation of friction was made by the dissent in *Ricks* and was rejected in the majority opinion. *Ricks,* 449 U.S. at 256.

Petitioner also attempts to raise two arguments in his Petition which were not raised in the District Court or the Court of Appeals. Petitioner argues that the tenure denial was "expressly based" on the Tenure Committee's recommendation and that the Tenure Committee's changed decision was a nullification of the special terminal provision in the employment contract. As these arguments were not presented to the lower courts, Petitioner should not be allowed to raise them for the first time in this Court. Further, the arguments are meritless. First, while Dr. Reynolds did mention the Tenure Committee's recommendation in his letter, there is no indication that this was the only factor considered by Dr. Reynolds. Dr. Reynolds may well have had additional bases for denying

tenure. Second, the Tenure Committee cannot nullify contractual provisions. Contracts are issued by the President, and the President makes the ultimate tenure decision.

In summary, *Ricks* required the District Court and the Court of Appeals to identify precisely the unlawful employment practice of which Petitioner complained. The District Court and the Court of Appeals correctly identified the alleged unlawful decision as the decision to deny tenure on February 20, 1995. This is the decision which Petitioner maintains was infected by McClanahan's discriminatory animus towards him. As more than 300 days elapsed before Petitioner filed his Charge of Discrimination, the Title VII claims were barred by the statute of limitations.

Third Ground – The Case Contains an Additional Defect

The case contains a defect which would render review by this Court meaningless as to the ultimate outcome of the case. Even if this Court accepted Petitioner's argument and decided that the EEOC charge was timely filed, the result would be the same. On page 11 of his Petition, Petitioner specifically states that the February 1995 and the November 1995 decisions were separate and distinct employment actions. Thus, the charge would be timely as to the second decision but not as to the first. Petitioner, however, did not allege any discrimination in the second decision. The only alleged discrimination occurred in the first decision. Should this Court adopt Petitioner's arguments, the result would be that the case would return to the District Court for it to review a

decision as to which there has been no allegation of discrimination. Such an exercise would be pointless and a waste of judicial resources. This defect in the case is yet another reason the Court should deny certiorari.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit improperly applied the law established by the statute and this Court to the facts in this case. Such an evidentiary review is not favored by this Court. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties. Additionally, the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Baylor requests that Petitioner's petition be denied.

Respectfully submitted,

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